Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

CONNIE M. JONES
Petitioner
V.
STATE OF KANSAS
Respondent

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Double Jeopardy Clause of the United States Constitution, prohibit a second trial in a criminal prosecution where the first trial was defective due to multiple errors committed by an inexperienced and unprepared prosecutor?

PARTIES TO THE PROCEEDINGS

The Petitioner, Connie Jones, is a resident of the State of Kansas. She is represented by Russell Mills, KS Attorney Registration No. 10761 and Mark Sevart, KS Attorney Registration No. 12503. These attorneys have office located at 111 N. Baltimore, Derby, KS 67037. They can be reached at Phone: (316) 686-1519 and Fax No. (316) 788-7437.

The Respondent is the State of Kansas which is represent by the Eighteenth Judicial District Attorney, Nola Foulston, KS Attorney Registration No. 09175 and her staff of Assistant District Attorneys. These attorneys have an office located at 535 N. Main, Wichita, KS 67203. They can be reached at Phone: (316) 383-7281 and Fax No. (316) 383-7266.

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PRAYER FOR RELIEF

The Petitioner seeks to have a State of Kansas Trial Court's Order of Dismissal reinstated in this criminal case.

DATE OF KANSAS SUPREME COURT RULING

October 11, 2005

NATURE OF CASE

The Petitioner was convicted by a jury of Driving Under the Influence of Alcohol and other related traffic offences. The Petitioner's motion for a new trial was granted because the young prosecutor had made a number of mistakes in the trial. The Honorable Judge Rebecca Pilshaw dismissed the case finding that a second trial would be barred by the Double Jeopardy Clause of the United States Constitution. The Kansas Court of Appeals overturned the trial Court and the Kansas Supreme Court denied a Petition for Review.

STATEMENT OF FACTS

The Defendant in this case was originally charged with failure to maintain a single lane, transporting an open container and driving under the influence of alcohol. (R. I, 14). Originally the DUI charge was filed in the alternative as violations of KSA 8-1567(a)(2) and KSA 8-1567(a)(3). (R. I, 14).

The case went to jury trial before the Honorable Judge Eric Yost. At trial the State introduced a breath test result, over Defendant's timely objection. (R. IV, 100-101). Before the State rested its case, the Defense again objected to the admissibility of the breath test result. The objections were that the test was more than two hours old and that the results had been admitted without the proper foundation. KSA 8-

1002(a)(3) requires the introduction of a form DC 27 before a breath test result is admissible. (R. V, 5-12). The State then, over Defense counsel's objection, amended a charge to reflect a violation of KSA 8-1567(a)(1) not (a)(2). (R. V, 12).

The Jury returned a verdict of Guilty to all counts including both counts of DUI. (R. I, 49-50.). The Trial Judge noted immediately after the verdict that there was a problem with the Jury Verdict. (R. V. 39-40). The Defendant was then required to file a motion for a new trial.

The Trial Judge granted the Defendant's motion for a new trial saying, " I think it's going to- - there's a good chance this would be reversed for some of the reasons Mr. Sevart indicated. So I'm going to go ahead and grant the motion for new trial." (R. VI , 10.)

At a later motion, Judge Pilshaw granted the Defendant's motion to dismiss, agreeing with the Defense that too many errors had been committed and that the Defendant would be prejudiced by a second trial. (R. II, 28.). She found that a second prosecution would be a violation of the Double Jeopardy Clause of the United States Constitution.

The Kansas Court of Appeals overturned the trial Court and the Kansas Supreme Court denied a Petition for Review. (See Appendix.). At the appellant level the State argued that the prosecutor was inexperienced and unprepared but was not malicious. The Petitioner argued that the gross negligence on the part of the inexperienced and unprepared prosecutor reached the same level of misconduct which would bar a second trial. The Court of appeals found that the second prosecution was not barred by the Double Jeopardy Clause due to an absence of prosecutorial misconduct intended to provoke the Defendant to file a motion for a new trial. (See Appendix.)

ARGUMENTS AND AUTHORITIES

The Double Jeopardy Clause of the United States Constitution, prohibits a second trial in a criminal prosecution where the first trial was defective due to multiple errors committed by an inexperienced and unprepared prosecutor.

A. Standard of Review

The standard of review by the United States Supreme Court on whether the Double Jeopardy Clause bars a retrial is a question of law and is subject to de novo review. United States v. Rodriquez-Aguirre, 73 F 3rd 1023 (10th Cir. 1996). In re Habeas Corpus Petition of Minnis, 29 Kan. App. 2d 644(2001), rev. denied 273 Kan. 1035 (2002).

B. Discussion

The Double Jeopardy Clause of the United States Constitution protects against successive prosecutions for the same criminal offence. United States v. Dixon, 509 US 688 (1993). It is imposed on the states through the 14th amendment.

It is undisputed that the first trial contained a number of critical errors, all of which were committed by an inexperienced and unprepared prosecutor. These errors include the States intentional introduction of a breath test result, without the statutory foundation being provided. The second error was the States intentional act of amending it's complaint, very late in the trial, from a count of DUI under 8-1567(a)(2) to a count of DUI under KSA 8-1567(a)(1). A third problem was the Jury found the Defendant guilty on all Count's without regard to the alternative Jury Verdict form.

The prosecutor started the trial without being aware that the breath test was more than two hours old. It was only after the presentation of the witnesses and her resting her case

before she moved to amend her complaint. The information was clearly available to her before the trial had she simply read the police reports.

At the trial, the prosecutor did not offer evidence of a DC 27 form which is a fundamental part of the foundation for a breath test result. She failed to correct her foundation problem at the first trial, even when she was notified of the foundation problem before she rested her case.

Everyone is in agreement that the breath test evidence was offered intentionally and after a proper objection. Everyone is in agreement that the original trial was fatally defective do to the multiple errors committed by the young prosecutor.

The Trial Court found that the Defendant would be prejudiced by a second prosecution and that the Double Jeopardy Clause would prohibit a second prosecution. The Trial Court, however, also found that the young prosecutor was not malicious.

The States of Kansas appealed the dismissal to the Kansas Court of Appeals. The State of Kansas cited State v. Wittshell, 275 Kan. 442, 66 P.3d 831 (2003), as authorizing a second trial, unless it can be shown that the prosecutor intentionally goaded the Defendant to move for the mistrial.

The State also cites State v. McClanahan, 259 Kan. 86, 910 P.2d 193 (1996) as authority that a showing of intentional prosecutorial misconduct and ill will is needed to bar a second trial. McClanahan was a murder case wherein the error was committed by the prosecutor during cross examination of a defense-produced witness. In McClanahan, the Kansas Supreme Court did hold that:

> The constitutional interest protected by Oregon v. Kennedy, 456 U.S. 667, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982), is that a defendant should be allowed to freely choose whether he or she should request a mistrial

> and forego the right to have the matter decided by the first trier of fact. Where the prosecutor seeks to force the defendant into a choice, then the choice is not freely made and the prosecution has subverted the defendant's rights protected by the Double Jeopardy Clause of the United States Constitution.

McClanahan at Syl.3.

The Kansas Court of Appeals relied heavily on the United States Supreme Court holdings in Oregon v. Kennedy, 456 U.S. 667, 72 L. Ed 2d 416, 102 S. Ct. 2083 (1982). In Kennedy, the Supreme Court required a showing of actual malice on the part of the prosecutor before barring a second trial.

The problem with this test is, how can you ever prove whether a prosecutor was being malice or just grossly negligent? Can gross negligence reach the level of injury and prejudice to a defendant that actual malice creates?

The Kansas Appeals Court also looked at State v. Muck, 262 Kan. 459, 939 P2d. 896 (1997). The Muck case is a DUI case and was the one cited by the Defense to prove that the DC 27 was a mandatory part of the foundation for a breath test. It is also the case where Kansas adopted the rulings of Kennedy. In State v. Muck, the trial court found the States actions to be intentional but sent the case back to see if the actions of the prosecutor were intended to cause a mistrial.

In the present case we have a prosecutor who intentionally offered evidence without providing the proper statutory foundation. She was made aware of the foundation problems on more than one occasion and had the opportunity to correct her actions before resting her case. She had the opportunity to recall a witness to offer the DC 27 but chose not to. She chose not to correct the defect leaving the Defense with any option but to file its motion for a new trial.

It is a common long-standing rule of law, that a person

ordinarily intends the natural and usual consequences of their voluntary actions. See Bell v. Tilton, 234 Kan. 461, Syl. #2, (1983) (In tort law, where an intentional act results in injuries which are a natural and probable result of the act, the injuries are intentional.)

It is prejudicial to a criminal defendant to bear the cost of teaching a prosecutor how to prepare and try a case. A state prosecutor should have a duty to come to court prepared and not just show up and shoot from the hip. A prosecutor should not be allowed to violate rules of evidence, violate rules of procedure, due anything to get a conviction and then claim inexperience when the motion for new trial is granted.

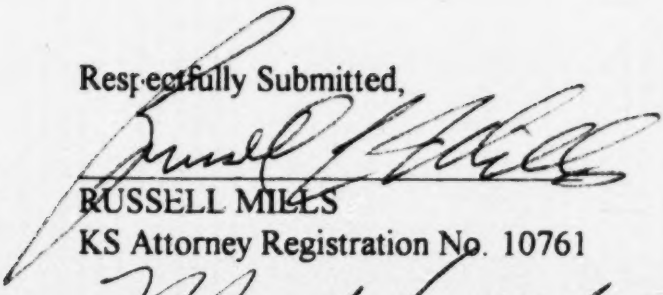
The Petitioner in this case prepared a defense based on the charges filed and the evidence available through discovery. The State now knows all of the cards held by the defense. They now know the defects in their case and will be given the opportunity to go fill the gaps in their case.

There is no question but that the actions of amending the charges and introducing the breath test without foundation was intentional. Clearly the Jury was confused by the prosecutors actions. Clearly the prosecutor had the opportunity to fix her mistakes before resting her case. Instead she went further leaving the Defense no option but to move for the mistrial. The natural and reasonable result is the Defendant was forced into making a choice of moving for the mistrial. The Double Jeopardy Clause bars the second prosecution.

CONCLUSION

The trial Court was correct in ruling that under the facts of this case, and given the number of errors in the first trial, and given the prosecutor's opportunity to correct, the Defense was forced to move for the new trial. Since the errors where the intentional acts of the prosecutor, and given the natural consequences being, a Defendant's motion for a new trial, the Double Jeopardy Clause bars the second trial.

Respectfully Submitted,



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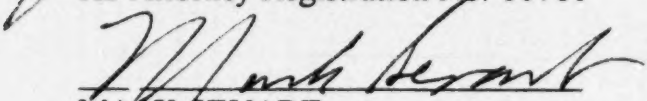

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APPENDIX

1. Kansas Court of Appeals Opinion

2. Kansas Supreme Court Opinion

NOT DESIGNATED FOR PUBLICATION

No. 92,504

IN THE COURT OF APPEALS FO THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

CONNIE M. JONES,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; Rebecca L. Pilshaw, judge. Opinion filed July 1, 2005. Appeal sustained.

Boyd Isherwood and *Lesley A. Isherwood, assistant district attorney,* Nola Foulston, district attorney, and *Phill Kline,* attorney general, for appellant.

Mark Sevart, of Derby, for appellee.

Before RULON, C.J., GREENE, J., and KNUDSON, S.J.

Per Curiam: The State of Kansas appeals the district court's dismissal of . . charge of driving under the influence of alcohol (DUI) and related charges against Connie M. Jones, based on double jeopardy consideration, after granting Jones' motion for new trial due to multiple errors in her first trial. The State argues that because there was no prosecutorial misconduct, the mere granting of a new trial to the defendant

does not implicate double jeopardy. We agree with the State and sustain the appeal.

Factual and Procedural Background

Jones was charged and tried for failure to maintain a single lane, transporting an open container, and DUI. During the trial, the State introduced evidence of a breath test taken after Jones was arrested. Jones timely objected to introduction of that evidence fo lack of foundation, but the trial court overruled the objection and the breathalyser results were admitted into evidence. A the conclusion of the trial, the jury returned a verdict of guilty on each charge.

Prior to sentencing, Jones filed a motion for acquittal and a motion for a new trial. In the motions, Jones argued the trial court improperly admitted the breathalyser results because the State failed to comply with K.S.A. 8-1001(f), resulting in a ack of foundation, K.S.A. 8-1001(f) requires the State to produce either the DC-27 or DC-70 form, which prove that a defendant was properly advised of his or her implied consent rights set forth under that section before the breath test is administered. The State failed to produce those forms at trial, and thus there was insufficient foundation to admit the breathalyser test.

The trial court held a hearing on the matter, at which the State advised the court it had the forms but simply erred at trial in failing to offer the forms into evidence prior to inquiring about the breathalyser test results. Jones argued that improper introduction of the breathalyser test results tainted the entire trial, thus warranting a new trial. The trial court agreed with Jones and ordered a new trial.

Prior to the second trial, Jones filed a motion to dismiss on the grounds that a second prosecution would violate the

Double Jeopardy Clauses of the Kansas and United States Constitutions. The trial court agreed and dismissed the charges against Jones with prejudice. In dismissing the case, the trial court asked rhetorically, "[I]s it fair that the defendant should be prejudiced by the State getting a second bite at the apple of getting in evidence that it failed to get in--that it failed to get in the first time?" The trial court went on to state, "[T]hat has never been the rules under which we play. It's often not fair to the State, but the State is not the one who is perhaps losing their liberty or whatever–I mean, that's our Constitution and the way it works." Upon inquiry by the prosecutor, however, the court expressly stated that it made no finding of prosecutorial misconduct.

The State timely filed this appeal.

Did the District court Err in Granting Defendant's Motion to Dismiss Due to Double Jeopardy Considerations?

> "Whether a retrial is barred due to double jeopardy is a question of law subject to de novo review. [Citation omitted.]" *In re Habeas Corpus Petition of Minnis*, 29 Kan. App. 2d 644, 646, 29 P.3d 462 (2201), *rev. denied* 273 Kan. 1075 (2002).

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same [offense] to be twice put in jeopardy of life or limb." Such double jeopardy protection is applicable to the States though the Fourteenth Amendment to the United States Constitution. Similar protection against double jeopardy is also provided in the Kansas constitution Bill of Rights § 10.

It is well established that double jeopardy is not implicated solely by the need for a second prosecution due to the defendant's motion for new trial. K.S.A. 21-3108 addresses

the effect of former prosecutions, providing in relevant part:
"(4) A prosecution is not barred under this section:

"(c) If subsequent proceedings resulted in the invalidation, setting aside, reversal or vacating of the conviction, unless the defendant was adjudged not guilty."

Our appella e courts have consistently held that there are generally no double jeopardy implications to a second prosecution for the same offense when an initial conviction has been invalidated at the behest of the defendant. In Kansas, "[a]n accused waives his right to plead double jeopardy when after conviction he applies for and is granted a newt rial." *State v. Bloomer*, 197 Kan. 668, 675, 421 P.2d 58 (1966), *cert. Denied* 387 U.S. 911 (1967). Further, "when a new trial is granted on the motion of the defendant in a criminal prosecution, the granting of the same places the party accused in the same positio. as if no trial had been and. [Citations omitted.]" *State v. Osburn*, 216 Kan. 638, 6410-42, 533 P.2d 1229 (1975).

The only recognized exception to this general rule is for the narrow circumstances of prosecutorial misconduct described in *Oregon v. Kennedy*, 456 U.S. 667, 72 . Ed. 2d 416, 102 S.. Ct. 2083 (1982), and embraced by our Supreme Court in *State v. Much*, 262 Kan. 459, 467, 939 P.2d 896 (1997). *Kennedy* requires intent by the prosecutor to provoke the defendant into moving for a mistrial; the test has been articulated as:

"[A] defendant should be allowed to freely choose whether to request a mistrial and forego the right to have the matter decided by the first trier of fact. Where the prosecutor seeks to force the defendant into a choice, the is not freely made and the prosecutor has subverted the defendant's a rights protected by the double Jeopardy Clause[s] of the constitution. Here if the defendant was forced into requesting a mistrial by the

prosecutor's intentional misconduct, retrial would be barred by K.S.A. 21-3108(1)(c) and by the Double Jeopardy Clause of the Kansas and United States Constitutions." *State v. McClanahan*, 259 Kan. 86, 102, 910 P.2d 193 (1996).

"Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause....Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Muck*, 262 Kan. At 470 (quoting *Kennedy*, 456 U.S. at 675-76).

Although Jones argues that *Kennedy* exception applies here due to the prosecutor's acts in intentionally offering evidence without the proper statutory foundation, both *Kennedy* and *Muck* for a supplemental finding in this regard, no such remand is appropriate here because the district court expressly declined to find that there had been prosecutorial misconduct. In the absence of *any* misconduct by the prosecutor, we certainly cannot conclude that the *Kennedy* exception has been met.

We conclude that the district court erred in dismissing the charges against Jones. There are no double jeopardy implications in this case to a second prosecution for the same offenses due to the absence of prosecutorial misconduct specifically intended to provoke the defendant's motion for new trial.

Appeal sustained.

Supreme Court Order District Case No. 02 TR 16297 SG

IN THE SUPREME COURT

OF THE STATE OF KANSAS

Mark A. Sevart
111 North Baltimore
Derby, KS 67037

Case No. 04-92504-A

State of Kansas, Appellant,
V.
Connie M. Jones, Appellee.

Your are hereby notified of the following action taken by the court:

Petition for review by Connie M. Jones.

Considered by the Court and Denied.

Dated: 10/11/2005.

Carol G. Green
Clerk